IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9169 of 1998
WITH
CIVIL APPLICATION NO.9977 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

P K THAKKAR CONSTRUCTION PVT. LTD.

Versus

ASSISTANT GENERAL MANAGER

Appearance:

1. Special Civil Application No. 9169 of 1998

MR NANDLAL THAKKAR for Petitioner No. 1
MR JS YADAV for Respondent No. 1
MR SUNIT S SHAH for Respondent No. 2
MR AY KOGJE for Respondent No. 2

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 09/10/2001

ORAL JUDGEMENT

1. The petitioner in this petition under Article 227

of the Constitution of India has challenged the legality of the proceedings of original Recovery Application No. 147 of 1998 initiated by the respondent Bank before the Debts Recovery Tribunal (hereinafter referred to as 'DRT') Ahmedabad and prayed for quashing and setting aside the said proceedings. The petitioner has also prayed to expedite the hearing of Special Civil Suit No. 168 of 1997 filed by it before the learned Civil Judge, Senior Division, Ahmedabad Rural. In the suit filed by the petitioner, the respondent, vide an application Ex. 226 dated 11.1.2001, requested the trial court to transfer the said suit to DRT in view of the decision of the Apex Court in the case of United Bank of India Vs. Abhijeet, AIR 2000 SC 2957. The learned trial judge, by his order dated 27.7.2001, allowed the said application and ordered R.& P. to be sent to the DRT for further trial in accordance with law. The petitioner has challenged the said order of the trial court in Civil Application No. 9977 of 2001 and prayed for quashing and setting aside the order dated 27.7.2001 passed below Ex. 226 by the trial court. On 12.9.2001, after hearing the learned Counsel for the parties, the said Civil Application was ordered to be heard with the main petition. The main petition was also fixed for hearing on 25.9.2001. This Court stayed the operation and implementation of the order of the trial court in the meantime.

2. The petitioner is a private limited company registered under the Companies Act, 1956 and is engaged in the business as a contractor carrying out construction work. The respondent bank gave an advertisement in the local daily newspaper for construction of training centre building in accordance with the plans approved by the bank and their architect on the vacant land. Pursuant to the advertisement published in newspaper for construction of training centre building, the petitioner made an offer by its letter dated 1.2.1994 and the respondent bank, by its letter dated 25.2.1994, accepted the proposal for constructing premises for housing residential Staff Training Center on certain terms and conditions vide letter dated 26.7.1994 annexure E addressed by the bank to the petitioner. It was conveyed that the bank has agreed to grant a term loan of Rs. 99 lacs for the construction of premises of Staff Training Center at Ahmedabad. The bank in fact disbursed the amount phasewise on completion of particular work. The respondent bank disbursed Rs. 94 lacs to the petitioner. The bank was to disburse Rs. 5 lacs on completion of the project and on handing over possession. However, the respondent bank did not take possession of the premises.

As per the terms and conditions agreed between the parties, the petitioner informed the respondent bank in writing on 18.5.1995 to take possession of the training centre. One more reminder was sent on 12.7.1995. It is the case of the petitioner that he thereafter made oral as well as written requests to the respondent bank authorities for taking possession of training center after execution of lease deed and release of balance amount of Rs. 5 lacs. However, for the reasons best known to the respondent bank, no action was taken. The petitioner thereafter gave legal notice on 15.8.1996 annexure D to the petition. On receiving the said notice, the respondent bank, gave notice dated 29.8.1997 for alleged breach of contract. The respondent bank ultimately rescinded the contract without any cause or reason. The petitioner was, therefore, left with no other alternative but to file a suit being Special Civil Suit No. 168 of 1997 in the Court of learned Civil Judge, Senior Division, Ahmedabad Rural for damages under the contract and for recovery of Rs. 3,08,48,332/-. The said suit was filed on 15.9.1997. The respondent Bank also filed a Recovery Application No. 147 of 1998 before the DRT on 8.6.1998 for recovery of their dues from the petitioner. Along with the recovery application, an application for stay was also filed by the respondent restraining the petitioner from transferring possession of the aforesaid training center or creating any charge or encumbrance upon the same. The petitioner was served with summons on 11.6.1998 who moved this Court by way of present petition challenging the jurisdiction of DRT to entertain the application filed by the petitioner. As the trial court was not prohibited from proceeding further with the suit of the petitioner, during the pendency of the petition, the trial court proceeded further with the hearing of the suit and recorded evidence of the petitioner as stated by the learned Counsel for the petitioner. It is only on 11.1.2001, the respondent bank filed an application Ex. 226 requesting the trial court to transfer the suit to DRT for further trial. In view of the judgment of the Supreme Court reported in the case of United Bank of India Vs. Abhijeet Tea Co.Ltd., AIR 2000 SCC 2957, the trial court transferred the suit to DRT. As stated above, the said order of the trial court is under challenge in the present proceedings.

3. Heard learned Counsel appearing for the petitioner as well as learned Advocate General Mr. Shelat with Mr. Sunit Shah, for the respondent Bank.

4. Learned Counsel for the petitioner submitted that

the amount advanced by the bank is neither a'debt' nor a term loan. The transaction entered into between the parties does not attract any of the requirement of section 2(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 'the Act'). It is, therefore, submitted that the DRT has no jurisdiction to decide the dispute between the parties. It is submitted that as the jurisdiction of the Tribunal is challenged as provided under section 18 of the Act, this Court will have overall jurisdiction under Article 227 of the Constitution of India for setting aside the proceedings initiated by the respondent bank before the Tribunal. Learned Counsel challenged the decision of the trial court of transferring the suit by contending that the trial court misread the decisions of the Apex Court. It was contended that the trial court has failed to consider that the DRT does not have jurisdiction to entertain suit under the Contract Act and under Specific Relief Act as the suit of the plaintiff is for damages and is not within the framework and meaning of the Act. In the submission of the learned Counsel for the petitioner, the Tribunal will have jurisdiction and authority to entertain the Recovery Application of the bank or the financial institutions and in any case, it will not decide the suit for damages filed by any person against the bank or the financial institution. It was further submitted that section 31 of the Act provides that every suit or other proceeding pending before any Court immediately before the date of establishment of a Tribunal under the Act shall stand transferred to the Tribunal. However, the present suit which is filed subsequent to the establishment of the Tribunal, cannot be transferred to DRT.

5. Learned AG appearing for the respondent Bank raised preliminary contention regarding the maintainability of the petition. He, after inviting my attention to the relevant provisions of the Act and Rules, submitted that the petitioner in the instant case has been served with summons and he has still not filed written statement and in absence of adjudication and any judicial order having been passed, the petition is at premature stage and, therefore, not maintainable. Learned Advocate General submitted that this Court shall not exercise its jurisdiction when no adverse order is passed by the Tribunal. On merits of the case, it was submitted that DRT is the only forum which can decide the dispute between the parties as the word 'debt' is defined exhaustively in the transactions having taken place between the parties. On the question of transfer of suit of the petitioner to DRT, learned Advocate General

submitted that in view of the amendment made in section 19, the Tribunal can decide the question of set off as well as counter claim. The learned Advocate General, however, fairly conceded that the said question can arise provided this Court dismisses the petition and allows the DRT to decide the application filed by the petitioner. In other words, in the submission of learned Advocate General, if this Court allows the petition and sets aside the proceedings initiated by the respondent Bank before DRT, in that event, civil court can decide the suit for damages filed by the petitioner.

To substantiate their submissions, both the learned Counsel have cited number of authorities, which I will refer at appropriate stage.

6. For the purpose of appreciating submissions advanced before, it is necessary to refer to the relevant provisions of the Act. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides for establishment of Tribunals and appellate Tribunals for expeditious adjudication and recovery of debts of the banks and financial institutions. Section 2(d) defines 'bank' to mean:

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(iii) State Bank of India

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Section 2(g) defines 'debt' as under:

"2(g): 'debt' means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application."

From the plain reading of the expression 'debt', it is clear that it has to be given a widest amplitude to mean any liability which is claimed as due from any person by a bank or financial institutions during the course of any business activity undertaken by the bank either in cash or otherwise, whether secured or unsecured, or assigned,

or whether payable under a decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage and legally recoverable on the date of the application.

Section 2(o) defines 'Tribunal' to mean the Tribunal established under subsection (1) of section 3. Section 3 deals with jurisdiction, powers and authority conferred on the Tribunals. Section 17 of Chapter III also deals with the jurisdiction, powers and authority of Tribunals. Section 17(1) reads as under:

"17(1):A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions."

Reading the said provisions, it is clear that the Tribunal shall exercise on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks for recovery of debts due to such banks and financial institutions.

Section 18 deals with bar of jurisdiction and provides that on and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, power or authority (except the Supreme Court, and a High Court exercising jurisdiction under Arts. 226 and 227 of the Constitution) in relation to the matters specified in Section 17.

Section 19 deals with the application to Tribunal which is substituted by new section with effect from 20.1.2000.

Sub-section (1) of section 19 entitles a bank or financial institution to make an application to the Tribunal to recover debt from any person. Clauses (a), (b) and (c) of the said sub-section provide for details of the local limits of whose jurisdiction the defendant or defendants reside at the time of making application to the Tribunal. Sub-section (2) provides that where a bank or a financial institution which has to recover its debt from any person has filed an application to the Tribunal and against the same person, another bank or financial institution also has a claim to recover its debt, then the later bank or financial institution may join the applicant bank or financial institution at any stage of the proceedings before the final order is passed, by

making an application to that Tribunal. Sub-section (3) provides that application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee as may be prescribed.

Sub-section (4) provides that the Tribunal is required to issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted. Under sub-section (5), the defendant is required to file written statement on or before the first hearing or within such time as the Tribunal may permit. Under sub-section (6), defendant is required to give set off against the applicant's demand and ascertain the sum of money legally recoverable by him. The defendant is required to claim set off at the first hearing of the application, and not afterwards unless permitted by the Tribunal. The defendant is also required to present a written statement containing the particulars of the debt sought to be set off. Sub-section (7) provides that the written statement shall have the same effect as a plaint in a cross suit so as to enable the Tribunal to pass final order in respect of both of the original claims and of the set off. Under sub-section (8), in addition to the right of pleading a set off under sub-section (6), the defendant by way of counter claim against the claim of the applicant, can claim such right. Sub-section (9) provides that a counter claim under sub-section (8) shall have the same effect as a cross suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter claim. Sub-section (10) empowers the applicant to file written statement in answer to counter claim of the defendant within such period as may be fixed by the Tribunal. Under sub-section (11), the Tribunal, before issues are settled in relation to the counter claim, can exclude counter claim by way of an independent action upon the application made by the applicant in that regard. Sub-section (12) authorises the Tribunal to pass interim orders against the defendant to debar him from transferring, alienating or disposing of any property or assets belonging to him without the prior permission of the Tribunal. Sub-section (13A) authorises the Tribunal to pass appropriate orders either to furnish security to satisfy the certificate for recovery of debt or to appear and show cause why he should not furnish security in case the defendant intents to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him. Sub-section 13(B) provides that where the defendant fails to show cause why he

should not furnish security or fails to furnish the security required within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt. Under sub-section (14), the applicant is required to specify the property required to be attached and the estimated value thereof unless the Tribunal otherwise directs. Under sub-section (15), the Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under sub-section (14). Under sub-section (16), if the attachment is made without complying with the provisions of sub-section (13), the same shall be declared as void. Under sub-section (17), the Tribunal is authorised to attach the property and also authorised to detain a person in civil prison not exceeding three months in case the person disobeys the order made by the Tribunal under sub-sections (12), (13) and (18). Sub-section (18) authorises the Tribunal to pass orders appointing receiver of the property whether before or after the grant of certificate for recovery of debt or to remove the person from possession or custody of the property or to commit the same to possession, custody or management of the receiver or to confer upon the receiver all such powers as to bringing and defending suits in the Courts or filing and defending applications before the Tribunal and for the realization, management, protection, preservation and improvement of the property, collection of rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has or such of those powers as the Tribunal thinks fit and also to appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof. Sub-section (19) provides that where a certificate of recovery is issued against a company registered under the Companies Act, 1956, the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529-A of the Companies Act, 1956 and to pay the surplus, if any, to the company. Sub-section (20) provides that the Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order, including the order for payment of interest from the date on or before which payment of the amount is found due up to the date of realisation or actual payment, on the application as it thinks fit to meet the ends of justice. Under

sub-section (21), the Tribunal is required to send a copy of every order passed by it to the applicant and the defendant. Under sub-section (22), the presiding officer is required to issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate. Under sub-section (23), where the Tribunal which has issued a certificate of recovery is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is situated, provided in a case where the Tribunal to which the certificate of recovery is sent for execution finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it. Under sub-section (24), the Tribunal is required to deal with the application under sub-section 1 and 2 and dispose of finally within 180 days from the date of receipt of the application. Under sub-section (25), the Tribunal is required to make such order and give such directions as may be necessary or expedient to give effect to its order to prevent abuse of its process or to secure the ends of justice.

Under section 20, right is given to an aggrieved person against the order made by the Tribunal to prefer an appeal to the Appellate Tribunal. Section 21 requires a person to deposit with the Appellate Tribunal 75% of the amount of debt so due from him as determined by the Tribunal. Section 25 prescribes mode of recovery of debts and authorises the Recovery Officer to recover the amount of debt specified in the certificate under sub-section (7) of section 19 by (a) attachment and sale of movable and immovable property of the defendant or assets of the defendant; (b) arrest of the defendant and his detention in prison and (c) appointing a receiver for the management of the movable or immovable properties of the defendant.

Section 28 also prescribes other modes of recovery. Section 31 deals with transfer of pending cases and provides that every suit or other proceeding pending before any Court immediately before the date of establishment of a Tribunal under the Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal. However, the said provision shall not apply to any appeal pending as aforesaid before any Court. Sub-section (2)

of section 31 provides that where any suit or other proceeding stands transferred from any Court to a Tribunal under sub-section (1), the Court shall, as soon as may be after such transfer, forward the records of such suit or other proceeding to the Tribunal, and (b) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceeding, so far as may be, in the same manner as in the case of an application made under section 19 from the stage which was reached before such transfer or from any earlier stage or de novo as the Tribunal may deem fit.

7. Reading the aforesaid provisions of the Act, it is amply clear that the provisions of the Act are complete Code by themselves. Under the Act, Tribunals and Appellate Tribunals are established for expeditious adjudication and recovery of debts due to them and financial institutions. The entire scheme of the Act suggests that the Tribunal shall adjudicate dispute in summary proceeding.

8. Dealing with the preliminary contention advanced by the learned Advocate General that the petition is not maintainable as it is at premature stage since the Tribunal has not adjudicated the disputes and, therefore, no adverse order is passed, ordinarily, this Court would not like to exercise its power under Article 227 of the Constitution in favour of a private party who has in substance challenged the dues of the Bank. However, there are cases and cases where the jurisdiction and/ or powers of authority is under challenge. This Court, by taking a shortcut in the matter, just cannot relegate the party to exhaust alternative remedy. It is also not certain that the said remedy will be efficacious remedy for the party which is challenging jurisdiction and power of the authority. In the circumstances, it will be nothing but to complete a formality. In the instant case, the common dispute between the parties is whether the transaction entered into between them amounts to debt which would attract the provisions of section 2(g) of the Act. For deciding the same, no oral evidence is required to be led. The said dispute can be adjudicated in view of the documentary evidence which is in the form of correspondence between the parties produced by the petitioner to support their case. The parties have produced the plaint as well as written statement of the civil suit by way of affidavit in the present proceedings. Not only that, necessary affidavits have also been filed. Thus, in view of this material, one can find out the nature of transaction entered into between the parties. If the transaction between the parties

attracts requirements of 'debt' as defined in section 2(g) of the Act, the Court can certainly direct the petitioner to oppose the application of the respondent Bank pending before the Tribunal by appearing in the proceedings. Reading the provisions of sections 17 and 18 of the Act, it is clear that the Tribunal will have power, jurisdiction and authority to entertain and decide the application of the bank for recovery of debts due to such banks. In other words, under section 18, no Court except the Supreme Court or the High Court shall have or will be entitled to exercise jurisdiction, power or authority in relation to the matters specified in section 17. Thus, this Court vests with the power in relation to the matters specified in section 17 of the Act. I, therefore, see no merit in the submission of the learned Advocate General that the petition is liable to be rejected on the ground that it is premature.

9. Learned Advocate General invited my attention to the following decisions to substantiate his submissions.

In the case of Chanan Singh Vs. Registrar, Co.op. Societies, Punjab and others, AIR 1976 SC 1821, Supreme Court dismissed the petition on the ground that it was premature. It was held that where the disciplinary proceedings against an employee dropped by inquiry officer who was not competent to impose punishment were revived by the competent officer by issuing fresh show cause notice against dismissal, the petition challenging such revival was premature.

In the case of State of UP Vs. Brahm Datt Sharma, AIR 1987 SC 940, it was laid down that when a show cause notice is issued to the Government servant under statutory provision calling upon to show cause ordinarily, the Government servant must place his case before the authority concerned by showing cause and the Court should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law.

There cannot be any dispute with regard to the principle laid down by the Apex Court. In those cases, the Apex Court has not closed the doors of the petitioner permanently. The Apex Court, by using the word "Ordinarily", asked the Government servant to place his case before the authority. However, by using the words "unless the notice is shown to have been issued palpably without authority of law", the Apex Court has shown way to the Government servant to approach the Court of Law. Thus, there is no total bar to challenge the show cause

notice provided the case is made out that the show cause notice is palpably without any authority of law.

Similarly, the Apex Court, in the case of Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh, AIR 1996 SC 691 did not encourage the petitioner to approach the Court challenging show cause notice against the eviction on the ground that the dispute raised was with regard to the questions of fact and, therefore, the petitioner was asked to show cause to the notice issued against him. In the present case, the facts can be seen on the basis of the documentary evidence and especially when the petitioner has challenged the very jurisdiction of the Tribunal, the said judgment will be of no help so far as the submissions of the learned Advocate General are concerned.

Similarly, the ratio laid down by the Apex Court in the case of United Bank of India Vs. Abhijeet Tea Co.Ltd., AIR 2000 SC 2993 cannot be made applicable to the facts of the present case. That was a case wherein the DRT had already passed an order directing sale of mortgage property. The said order was challenged in a petition under Article 227 of the Constitution which was entertained by the Supreme Court. The Supreme Court, in the said circumstances, held that the High Court should not have entertained the petition and directed the party to take recourse to the appeal mechanism provided by the Act. As observed earlier, by virtue of power under section 18 of the Act, this Court, under section 17 of the Act is competent to deal with the matters specified in section 17. In my opinion, the said decision can be distinguished on the facts of this case.

In the case of Allahabad Bank Vs. Canara Bank & anr., AIR 2000 SC 1535, the Apex Court, while construing sections 17, 18 and 25 of the Act and sections 537, 446 and 442 of the Companies Act, held that at the stage of adjudication under Section 17 and execution of the certificate under section 25 etc., the provisions of the RDB Act, 1993 confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to Banks and financial institutions and there can be no interference by the Company Court under S. 442 read with S. 537 or under S. 446 of the Companies Act, 1956. According to the Apex Court, under section 18, jurisdiction of any other Court or authority which would otherwise have jurisdiction, but for the provisions of the Act,is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This

exclusion does not however apply to the jurisdiction of the Supreme Court and of a High Court exercising power under Art.226 or 227 of the Constitution). Even as per the aforesaid decision, the High Court under Article 226 or 227 of the Constitution of India can exercise powers with respect to the matters under section 17 of the Act. In this view of the matter, I do not think that the aforesaid decision of the Apex Court will help the cause of the respondent Bank.

10. The principle enunciated in the aforesaid decision is that ordinarily the High Court will not exercise powers under Article 226/227 of the Constitution when statutory remedy is available unless the proceedings before the said authority are without jurisdiction or without any authority of law. This Court could have rejected this petition only on that ground when it was presented on 3.11.1998 for admission. However, considering the averments and documents executed between the parties, this Court prima facie felt absence of "debt" in the transaction between the parties and, therefore, after hearing the parties, on 18.12.1998, issued Rule in the matter.

11. It is now well settled that the jurisdiction of the Court to entertain the suit depends upon the averments made in the plaint. Therefore, whether the DRT will have jurisdiction to adjudicate the claim of the respondent Bank can be determined on the basis of the averments made in the application. The parties have placed on record the application of the bank before DRT and the plaint and written statement of the civil suit filed by the petitioner. The respondent Bank filed affidavit-in-reply on 1.8.2000 raising the contention of alternative remedy. The matter is taken up for hearing after more than two-and-half years. Once this Court entertains the petition after bilateral hearing and permits the trial court where the suit of the petitioner is pending to proceed with the hearing and the trial court has reached the stage of recording of evidence, it is not proper for this Court to reject the petition only on this ground by directing the petitioner to appear before the DRT and to oppose the application of the respondent. As stated above, this Court can also examine the matters relating to sections 17 and 18 on the question of debt which can be decided on the basis of pleadings of the civil suit as well as application of the respondent Bank before the DRT and the affidavits filed in the present proceedings. Thus, considering the peculiar facts and circumstances of this case, I reject the preliminary contention regarding maintainability of

the petition advanced by the respondents.

12. It is the case of the respondent Bank in the Recovery Application before DRT that it had released advertisement in local daily dated 5.7.1993 inviting offers for premises required for housing their Staff Training Center training center. In response to the said advertisement the present petitioner sent his offer vide letter dated 20.7.1993. After personal discussion between the parties, the Bank accepted the offer of the petitioner by letter dated 1.2.1994, conveyed their approval subject to terms and conditions stated therein. It is the further case of the Bank that the petitioner requested for term loan for the purpose of construction which the Bank intended to take on lease as per the terms and conditions spelt out by them in their letter dated 1.2.1994. Accordingly, the Bank sanctioned a sum of Rs. 99 lacs and communicated sanction vide its order dated 26.7.1994 and 10.8.1994. It is the further case of the respondent Bank that in order to secure repayment of dues under the aforesaid term loan of Rs. 99 lacs granted by the Bank to the petitioner, the Director of the present petitioner executed for valuable consideration and delivered to the Bank on 22.8.1994, the security documents in the prescribed form creating hypothecation and pledging of goods and assets, equitable mortgage etc. In substance, it is the case of the Bank that the petitioner availed of term loan from the Bank. As per the Statement of Accounts, the amount of term loan was disbursed from time to time. In the para of cause of action, it has been pointed out that the Bank, vide letter dated 1.2.1994, accepted the proposal of the petitioner to take premises on lease to be constructed by the petitioner for housing residential Staff Training Center center subject to certain terms and conditions spelt out therein. The respondent (present petitioner) committed breach of essential terms and conditions stated in the letter dated 1.2.1994. The petitioner had failed and neglected to comply with the said terms and conditions despite enough opportunity was given to the petitioner. The Bank was, therefore, left with no option but to take the premises on lease vide letter dated 1.2.1994. The petitioner was, therefore, required to repay the amount of term loan together with interest accrued thereon upon after the expiry of moratorium of 15 months from the date of disbursement of first instalment of term loan account as per sanction letter dated 10.8.1994. Since the contract was rescinded, premises in question were not taken on lease and, therefore, the question of repaying the term loan with interest from rent did not survive. As the respondent (present

petitioner) had failed and neglected to make repayment of term loan with interest as agreed upon between the parties, the Bank issued legal notice dated 28.2.1997 through their advocate calling upon the petitioner and its directors to pay an amount of Rs. 1,32,04,026.77 together with further interest at the rate of 18.75% p.a. with quarterly rent from 1.4.1997 till payment within 15 days from the date of the notice.

Mr.Soni Pravin Hiralal, Chief Manager of the Bank has filed affidavit-in-reply to the petition. In para 3, it is stated as under:

"At the outset, it is submitted that agreement to take on lease the premises in question by respondent Bank for its Staff Training College is not disputed by either party. Similarly, loan advanced by the respondent Bank to the petitioner is not disputed by either party. The respondent Bank rescinded the contract to take the premises in question on lease by their letter dated 28.8.1997 which fact is also not disputed by either party. According to petitioner, it is the respondent Bank who failed to take the premises on lease without any valid reason, whereas according to the respondent Bank, the petitioner failed to comply with the terms and conditions of the agreement to take the premises in question on lease. Therefore, there are disputes between the parties with regard to the responsibility and liability for the breach of the contract. It is an undisputed fact that petitioner has failed to repay the term loan granted by the respondent bank to the petitioner. "

13. Having gone through the averments made in the petition and the case of the Bank, it is clear that the petitioner has undertaken construction of Staff Training Center center for the Bank as per the approved plans.As per letter dated 26.7.1994 addressed by the applicant Bank to the petitioner, the Bank agreed to grant term loan of Rs. 99 lacs to the petitioner for construction of premises for Staff Training Center, Ahmedabad. The terms and conditions attached to the said letter are as under:

"(i) Security: The landlords will create an equitable mortgage of the leasehold rights as well as the construction, which shall be erected on the property, in favour of the Bank.
(ii) The landlords will give an undertaking to the

effect that in the event of purchase of reversionary interest by them from the lessors during the currency of the advance, the landlords will create a mortgage of the said property in favour of the Bank as an owner.

(iii) The landlords will submit certified copies of the TP Scheme showing/ indicating allotment of the respective plots of land to the respective lessors.

(iv) The landlords will submit a copy of the plan (as approved by the Bank) duly approved/ acknowledged by AUDA.

(v) Interest :The rate of interest applicable to the loan will be 15.50% p.a.

(vi) Repayment: The loan amount and interest due thereon will be recovered over a period of 8 years in 96 equated monthly instalments of Rs.. 1,79,190/- each from the rent payable by the Bank. The landlords will submit a letter authorising the Bank to do so. The repayment will commence from the day when the first payment of rent by the Bank becomes due or 15 months after the disbursement of first instalment of loan, whichever is earlier.

(vii) Loan will be disbursed in instalments corresponding to various stages of completion as approved by our Premises Department.

(viii) The advance will be made available to the landlords at Laghu Udhyog Branch as desired by the landlords.

(ix) The landlords will furnish an undertaking that the borrowings, if any, made by them to meet the margin money will not be repaid by them during the currency of the Bank's loan.

(1) Approval of plans, advance payment Rs. 15.00 lacs
for lift, completion of foundation
and basement, and work upto plinth
level.

(2) After completion of ground floor. Rs. 10.00 lacs

(3) After completion of first floor. Rs. 10.00 lacs

(4) After completion of second floor. Rs. 7.00 lacs

(5) After completion of third floor. Rs. 7.00 lacs

(6) After completion of fourth floor. Rs. 7.00 lacs

(7) After completion of fifth floor. Rs. 7.00 lacs

(8) Finishing of flooring, plastering Rs. 8.00 lacs
doors, windows and sanitary works
on all floors.

(9) Internal and external electrification Rs.. 4.00 lacs
works.

(10)Supplying & fixing of fans,tubelights
geysers. Rs. 2.00 lacs

(11)Compound works and bore well. Rs. 4.00 lacs

(12)Payments to AUDA, AEC etc. Rs. 2.00 lacs

(13)Payment to Architect,Structural Rs. 4.00 lacs
Engineer etc.

(14)Main approach road. Rs. 4.00 lacs

(15)Final payment to lift company. Rs. 3.00 lacs

(16)Completion of project and Rs. 5.00 lacs
handing over possession.

Rs. 99.00 lacs

As can be seen from the above statement, an amount of Rs. 94 lacs has been disbursed in instalments corresponding to various stages of completion of construction. According to the terms and conditions, repayment of the said amount and interest due thereon is to be recovered over a period of eight years i.e. 96 equal monthly instalments of Rs. 1,79,190/- each from the rent payable by the bank. The landlord- petitioner is required to submit in writing authorising the Bank to do so. The repayment is to commence from the date when the first payment of rent by the bank becomes due or 15 months after disbursement of first instalment of loan whichever is earlier. Reading the terms and conditions and more particularly the repayment clause (6), it is clear that the petitioner was to construct a Staff Training Center for the respondent bank. The bank was to advance loan. The bank was to disburse loan in

instalments corresponding to stages of completion of construction work and the amount of loan already disbursed was to be adjusted over a period of eight years in 96 instalments of Rs. 1,79,190/- each from the rent payable by the bank. The petitioner was to be treated as a landlord and repayment was to commence when the first payment of rent by the Bank was to become due or 15 months after the disbursement of first instalment of loan, whichever was earlier. In other words, the first payment becomes due no sooner bank takes possession and occupies the premises as a tenant or 15 months after the disbursement of first instalment of loan. In any case, the loan amount together with interest is to be recovered in equal monthly instalments from the rent payable by the bank. Misunderstanding between the parties is also suggestive of the fact that the petitioner is not to repay the amount already advanced by the bank by way of instalments. In sum and substance, in the instant case, the bank disbursed instalments corresponding to various stages of completion of construction. The bank was to occupy as a tenant and the bank was to adjust the amount already disbursed to the petitioner. Unfortunately, the bank did not occupy the premises though completed and on the contrary, rescinded the contract on 28.8.1997. The question arises as to whether the aforesaid transaction under which the amount was disbursed to the petitioner can be termed as a 'debt' within the meaning of section 2(g) of the Act. According to the definition of term "debt", any liability which is claimed as due from any person by a bank or a financial institution or by a consortium of bank or financial institution, during the course of business activity undertaken by a bank or financial institution or the consortium under any law for the time being in force, whether secured or unsecured, or whether payable undera decree or order of any Civil Court or otherwise and subsisting on and legally recoverable on the date of application. It would be immaterial whether the liability is secured or unsecured and whether it is payable under a decree or an order of a Civil Court or otherwise. However, it should be subsisting and legally recoverable on the day on which proceedings are initiated for recovering the same.

14. Learned Counsel appearing for the respondent bank submitted that the definition of 'debt' is exhaustive. According to him, the debt would cover any business activity undertaken by the bank.

15. My attention has been invited to section 33 of the State Bank of India Act which deals with other business which the State Bank of India may transact and

provides that subject to the other provisions contained in this Act, the State Bank may carry on and transact the business of banking as defined in clause (b) of section 5 of the Banking Regulation Act, 1949 and may engage in one or more of the other forms of business specified in sub-section (1) of section 6 of the Act.

Sub-section(b) of section 5 of the Banking Regulation Act, 1949 defines 'banking' to mean accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise.

Section 6 of the Bank Regulation Act provides forms of business in which banking companies may engage. My attention is invited to clause (a) of sub-section (1) of section 6 which provides that:

"6(1):In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:-

(a) the borrowing, raising, or taking up money; the lending or advancing of money either upon or without security; xxxxx "

In the submission of learned Advocate General, as the respondent bank, as a part of its business activity, disbursed the amount of loan by lending or advancing, it would attract a requirement of word 'debt' within the meaning of section 2(g) of the Act.

16. Learned Advocate General, after inviting my attention to the amended definition of'debt' under Act No.1 of 2000, submitted that as the word 'alleged claim' is deleted, any claim under mortgage will fall under 'debt'. My attention is invited to the judgment in the case of State Bank of Bikaner and Jaipur Vs. Ballabh Das & Co. and ors., (1999)7 SCC 539. It was a case of a bank where certain amount legally recoverable was due to it from the defendants during the course of its business activities and the defendants' liability continued to subsist. It was the case of the bank that the respondents were under the export credit facility, obtaining advances from the bank against pre-shipment and post-shipment export of certain categories of goods. The foreign buyers defaulted in payment to the bank of the bills and, therefore, the bank filed two suits against the respondents for the recovery of its dues. Considering the facts of the case, the Apex Court was of the opinion that the bank was justified in contending

that the amount legally recoverable was due to it from the defendants during the course of its business activities and, therefore, the defendant's liability continued to subsist.

17. In the case of United Bank of India Vs. DRT and ors,, (1999) 4SCC 69, the Apex Court observed that the and ors,, (1999) 4SCC 69, the Apex Court observed that:

> "Expression 'debt' has to be given the widest amplitude and objects of the Act have to be taken into consideration to interpret the provisions of the Act. Hence the suit filed by the appellantBank for recovery of debt from one of the several defendants and also for certain ancillary and incidental reliefs against other defendants was within the exclusive jurisdiction of DR Tribunal and not within the jurisdiction of civil court."

There cannot be any dispute with regard to the principle laid down in the said decision. I respectfully agree with the views expressed by the Apex Court. However, in my opinion, the facts of the case on hand are required to be gone into for deciding the jurisdiction of the Tribunal.

18. After having gone through the relevant provisions of the Act and the judgments cited above, it appears that in the instant case, the respondent- bank advanced the amount during its business activity. However, the said fact by itself cannot be treated as a 'debt' so as to attract section 2(g) of the Act. The bank has still to establish that the debt was subsisting and legally recoverable on the day on which the proceedings were initiated. As observed earlier, in the instant case, in respect of the transactions arrived at between the parties, the amount of advance is recoverable over a period of eight years in 96 equal monthly instalments of Rs. 1,79,190/- each from the rent payable by the bank. The relation between the parties is in the nature of landlord and tenant. It is now well established that the rent is not a 'debt' as obligation is not completed (See J.Jermons Vs.Aliammal and ors., [1999]7 SCC 382). As agreed between the parties, the repayment will commence on the date when first payment of rent by the bank becomes due. Therefore, the application was filed before DRT. Thus, on the date of the application, neither the debt was subsisting nor was it recoverable. Thus, instead of filing a suit for damages for breach of contract or under the Specific Relief Act, in my opinion,

the respondent bank has chosen a wrong forum under the misconception that the amount advanced is a debt. In the instant case, against the advance of Rs. 94 lacs by the bank, the petitioner has spent about Rs. 175 lacs towards the construction of building. The bank has not only rescinded the contract, but has filed an application only after the petitioner filed suit for damages and prayed for interim relief restraining the respondents not to transfer the building or to create charge in favour of anybody. It is hardly proper on the part of the bank now to contend that the petitioner be relegated to DRT so that it can oppose the claim of the bank.

19. At this stage, let us refer to the observations made in the judgment in a case which is somewhat similar to the present case. Lotus Hotel Pvt.Ltd. Vs. Gujarat State Financial Corpn., 22 GLR 982 was a case where the petitioner had applied for a loan of Rs.. 50 lacs from the Corporation for constructing a Four Star Hotel in the City of Baroda. It appears that the Corporation did not disburse the loan in compliance with the terms of agreement. Learned single judge of this Court, therefore, directed the Corporation to disburse the loan amount forthwith against which an appeal was preferred. The Division Bench of this Court rejected the said appeal and confirmed the order of the learned single judge. (See 23 GLR 49). The Corporation carried the matter before the Supreme Court. The Supreme Court also rejected the said appeal confirming the order of the learned single judge as well as the Division Bench. (See 24 GLR 1352). It was observed in the said decision that

"Where a public body like GSFC, in exercise of its statutory powers and in fulfilment of statutory duties, leads a citizen particular position in which that person changes his position and incurs certain liabilities or undertakes any expensive activity, the public body like the Corporation cannot then turn round and take shelter against the specious plea that as a contracting party, it is free to commit the breach of the contract and call upon the citizen to have his recourse in law by seeking damages in a case like the one on hand. What may be good for a contracting party may not necessarily be good for a public body like the Corporation which is not a free agent to act in a capricious whimsical or irrelevant manner."

It was further held that:

"xxx therefore, that it was not open to the

> Corporation to request the High Court to reject the petition in limine on the ground that the rights and liabilities of the parties flow from purely contractual relation."

It was further held that:

> "In the facts and circumstances of the case, there was no justification on the part of the respondent Corporation in refusing to advance the loan promised by the respondent Corporation which promise was acted upon by the petitioner to its material disadvantage from which retracing of steps is not possible except by inviting colossal costs resulting into the loss of the very existence of the petitioner company."

In the instant case also, the petitioner acted upon as per the terms and conditions by constructing a huge building of Staff Training College for the respondent bank. By spending huge amount over and above the amount given by way of advance by the bank, the building is ready for use. The respondent bank refused to take possession on the alleged breach of terms and conditions. The bank, therefore, rescinded the contract. When the petitioner filed a suit for damages instead of claiming set off or raising a counter claim in the suit, the bank filed an application before DRT and raised contention in this petition regarding the maintainability of the petition. Now, this stand of the respondent is not only prejudicial but to the material disadvantage of the petitioner. The bank is not expected to act in a capricious, whimsical or irrelevant manner. I, therefore, see no merits in the submissions of the learned Advocate General, namely that this Court cannot exercise jurisdiction in favour of the petitioner as the petitioner can appear before DRT and oppose the application of the respondent bank.

20. In view of the above, I am of the opinion that the petitioner has made out a case for quashing and setting aside the proceedings initiated by the respondent bank filed before the DRT. This petition is, therefore, required to be allowed.

21. In view of the above findings, namely that the DRT has no jurisdiction to decide the case filed by the respondent bank, the transfer of suit to DRT is of no consequence. Section 19 of the Act authorises the Tribunal to permit any person except the bank to claim set off or to make counter claim against the bank in the

application filed by the bank. As I have already held that the bank is not entitled to file an application as the alleged dues is not 'debt' within the meaning of section 2(g) of the Act, there is no question of the petitioner to claim set off by raising counter claim in the said proceedings. I, therefore, agree with the learned Advocate General when he argued that the suit of the petitioner cannot be transferred to DRT in the event of this petition being decided in favour of the petitioner.

22. Learned Counsel for the petitioner, however, contended that section 31 of the Act will have no application in the instant case as the suit is filed after the Act is made applicable and in any case, substituted section 19 will not have any application to the pending suit as it has no retrospective effect and, therefore, the decision of the Supreme Court rendered in the case of United Bank of India Vs. Abhijeet Tea Co. Ltd., AIR 2000 SC 2957 will have no application. In my opinion, all these questions are not required to be decided since I am allowing the petition and granting reliefs as prayed for.

23. In the result, this petition as well as Civil Application No.9977 of 2001 succeed and they are allowed. In view of what is stated above, the proceedings of Recovery Application No. 147 of 1998 along with stay application filed by the respondent- bank against the petitioner before DRT, Ahmedabad, are set aside. Order dated 27.7.2001 passed below Ex. 226 in Civil Suit No. 168 of 1997 by the learned Civil Judge, Senior Division, Ahmedabad Rural is set aside and the trial court is directed to proceed with the hearing of the suit and decide the same in accordance with law as expeditiously as possible and preferably within three months from the date of receipt of writ of this judgment.

Rule is accordingly made absolute with costs.

At the conclusion of this judgment, learned Counsel for the petitioner Mr. Thakkar fairly stated that even though the petitioner has succeeded in this petition, in the event of petitioner succeeding in the suit, the petitioner will pay all the dues of the bank after settling the accounts, even though the bank has not claimed set off or filed counter claim. I appreciate the gesture shown by Mr. Thakkar.

(K.R.Vyas,J.)

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